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November 3, 2011

BY HAND

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings

NOV 3 - 2011

Part of
Public Record

Re: Canexus Chemicals Canada L.P. v. BNSF Railway Company,
Docket No. 42131 and Finance Docket No. 35524

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket are an original and ten copies of Union Pacific Railroad Company's Opening Statement.

Please indicate receipt and filing by date-stamping the enclosed extra copy and returning it to our messenger.

Thank you for your assistance.

Sincerely,



Michael L. Rosenthal
Counsel for Union Pacific Railroad
Company

Enclosure

cc: Thomas W. Wilcox, Esq.
Samuel M. Sipe, Jr., Esq.
Terence M. Hynes, Esq.

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BEFORE THE
SURFACE TRANSPORTATION BOARD

_____)	
CANEXUS CHEMICALS CANADA L.P.,)	
)	
Complainant,)	
)	
v.)	Docket No. 42131
)	Finance Docket No. 35524
BNSF RAILWAY COMPANY,)	
)	
Defendant.)	
_____)	

**UNION PACIFIC RAILROAD COMPANY'S
OPENING STATEMENT**

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*Attorneys for Union Pacific
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November 3, 2011

)	
CANEXUS CHEMICALS CANADA L.P.,)	
)	
Complainant,)	
)	
v.)	Docket No. 42131
)	Finance Docket No. 35524
BNSF RAILWAY COMPANY.)	
)	
Defendant.)	
)	

Union Pacific Railroad Company ("UP") hereby submits its opening statement in accordance with the Board's order served October 14, 2011, as clarified by the Board's decision served November 1, 2011.

2

The Board's October 14 order states: "One or both of [BNSF and UP] is violating its common carrier obligation by refusing to provide service." Order at 5. The Board instituted the briefing schedule "to resolve this issue as quickly as possible." *Id.*¹

UP plainly is not violating its common carrier obligation. The common carrier obligation requires a rail carrier to "provide to any person, on request, the carrier's rates and other service terms" and to "provide the transportation or service on reasonable request." 49 U.S.C. §§ 11101(a), (b). Canexus is not requesting that UP establish rates and other service terms, or provide transportation or service for its chlorine traffic moving from Portland or Spokane to the destinations at issue in this case. UP and Canexus have entered into a contract under which UP has agreed to provide the service requested by Canexus. The Board is wrong even to suggest that UP may be violating its common carrier obligation.

Moreover, under Board precedent, UP has no obligation to accede to BNSF's demand to interchange Canexus's traffic in Portland and Spokane, rather than Kansas City. UP and Canexus have a contract that establishes rates from an interchange with BNSF at Kansas City, and BNSF had previously established a Kansas City interchange with UP for Canexus traffic moving between the origins and destinations at issue.

When a shipper needs two-carrier service from an origin to a destination, "the determination of an interchange point for the required through movement is, in the first instance, 'a matter of mutual consultation and agreement' between the two carriers." *Central Power & Light Co. v. Southern Pac. Transp. Co.*, 2 S.T.B. 235, 243 (1997) (quoting *New York, C. & St. L.*

¹ See also Decision served Nov. 1, 2011, slip op. at 4 ("UP must submit an opening statement explaining its rationale for its refusal" to interchange Canexus's traffic with BNSF at Portland and Spokane).

R.R. v. New York Cent. R.R., 317 I.C.C. 334, 346 (1961)). The carriers “together must provide at last *one* route to complete the shipper’s needed multi-carrier service from the desired origin point.” *Id.* “[I]f the carriers cannot agree on an interchange that would act to create that route, [the Board] will determine one.” *Id.* at 243-44.

“[A]bsent an agreement between the carriers,” the Board’s determination of an interchange is governed by a variety of factors, including “a comparison of the physical and operational feasibility of interchange at the points selected by the carriers,” the existence of a “shipper-carrier contract for service” for one of the segments, and the “efficiency of the entire origin-to-destination service using each of the chosen interchange points.” *Id.* at 244 & n.13.

BNSF’s prior establishment of a Kansas City interchange with UP for Canexus chlorine traffic moving to the destinations at issue demonstrates that the interchange location is feasible and that the routing is reasonably efficient. *Cf. FMC Wyo. Corp. v. Union Pac. R.R.*, 2 S.T.B. 766, 772 n.12 (1997) (“Because the Chicago and East St. Louis gateways are traditional interchange points between these carriers for this traffic, we are not faced with a concern that the bottleneck carrier might be shorthauled or required to participate in an inefficient routing.”).²

UP’s analysis of traffic data also supports the use of a Kansas City interchange for the traffic at issue. UP’s analysis indicates that Kansas City is used far more often than Portland to interchange traffic moving from BNSF-served origins in the Pacific Northwest to UP-served destinations in Arkansas, Illinois, and eastern Texas, as confirmed in the attached verification of Chris Sanford, UP’s Senior Manager, Interline Marketing. In 2010, BNSF and UP interchanged

² UP cannot perform a detailed comparison of the relative efficiency of alternative interchange points because it does not know how BNSF actually handles Canexus’s traffic from Vancouver or Marshall to Kansas City. BNSF has several possible routes, and UP has no information on BNSF’s specific operating plan for handling this traffic.

such traffic in Kansas City 13.3% of the time, and Kansas City was the fourth most commonly used interchange, after Chicago, Denver, and Memphis. Portland was used just 0.1% of the time. Spokane was never used as an interchange for Pacific Northwest traffic that BNSF forwarded to UP for delivery in eastern Texas, Arkansas, or Illinois.

BNSF's tariffs also support the use of a Kansas City interchange. BNSF's tariff governing movements of chlorine shows that BNSF remains willing to interchange chlorine traffic from other origins at Kansas City,³ and BNSF has not imposed any conditions on the interchange of chlorine with UP at Kansas City.⁴

BNSF's only legal argument thus far in favor of interchanging the traffic at issue in Portland and Spokane is that its choice is entitled to a statutory preference because it is the rail carrier *originating* the traffic.⁵ However, BNSF has simultaneously argued that it is "*in reality a bridge carrier and not an originating carrier*" for the traffic at issue.⁶ Moreover, even if BNSF could maintain its inconsistent positions, and even if the statute could be read to give reasonable

³ See BNSF Pricing Authority 90096, Implementing Agreement 5000, Amendment 59 (Effective Nov. 2, 2011), *available at* <http://www.bnsf.com/bnsf.was6/epd/EPDController> (follow the link to "Industrial Chemicals").

⁴ See OPSL Note No. BNSFAD0125, Amendment No. 13 (Effective Oct. 16, 2011), *available at* <https://aarembargo.railinc.com> (follow the links to "OPSL Notes," and "Search OPSL Notes").

⁵ BNSF Railway Company's Response to the Board's Order of June 8, 2011 Regarding Its Legal Position, at 12 (filed June 15, 2011) (citing 49 U.S.C. § 10705(a)(2)). BNSF also says it has adopted a policy under which it expects the destination carrier to provide long-haul service for chlorine, but it cites no legal principle or authority that would allow it unilaterally to impose its policy on other carriers.

⁶ *Id.* (emphasis added); *see also id.* at 6 ("When BNSF handles North Vancouver chlorine movements, it receives the traffic in Canada through a switch from [Canadian National Railway].").

preference to an origin carrier that suddenly chooses to short haul itself.⁷ BNSF never explains why the statutory “reasonable preference” outweighs the many other factors favoring an interchange in Kansas City.

Finally, even if Portland or Spokane were decidedly more efficient interchange points than Kansas City for traffic moving to the destinations at issue, UP would not necessarily have an obligation to interchange Canexus’s traffic at Portland or Spokane. Other interchange points may be even better. For example, BNSF and UP could readily interchange the traffic at Fort Worth, Texas (*e.g.*, traffic moving to Cloudy or Houston, Texas, and Waldo, Arkansas), or St. Louis, Missouri, via the Terminal Railroad Association of St. Louis and Alton & Southern Railway Company (*e.g.*, traffic moving to Dupon, Illinois), or Memphis, Tennessee, (*e.g.*, traffic moving to West Memphis, Arkansas), as confirmed in the attached verification of William S. Hinckley, Union Pacific’s General Director of Safety and Security. BNSF’s tariff governing movements of chlorine contains rates for traffic moving from North Vancouver and Marshall to Fort Worth, St. Louis, and Memphis, so interchanges at those locations also appear to be viable.⁸

⁷ As BNSF appears to acknowledge, that outcome would not have been contemplated by the statute’s drafters. *See id.* at 12 (“Normally, the originating carrier exercises that preference by selecting the long haul in order to maximize its revenue division and contribution.”).

⁸ *See* BNSF Pricing Authority 90096, Implementing Agreement 5000, Amendment 59, cited above in footnote 3.

Respectfully submitted,

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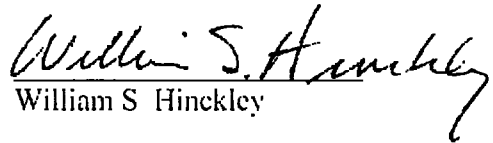
*Attorneys for Union Pacific
Railroad Company*

November 3, 2011

VERIFICATION
OF
WILLIAM S. HINCKLEY

I, William S. Hinckley, General Director of Safety and Security for Union Pacific Railroad Company, declare under penalty of perjury that I have read Union Pacific Railroad Company's Opening Statement and that the portion describing the ability of BNSF Railway Company and Union Pacific to interchange chlorine traffic in Ft. Worth, Texas; St. Louis, Missouri; and Memphis, Tennessee is true and correct. Further, I certify that I am qualified and authorized to sponsor this testimony.

Executed on November 2, 2011.


William S Hinckley

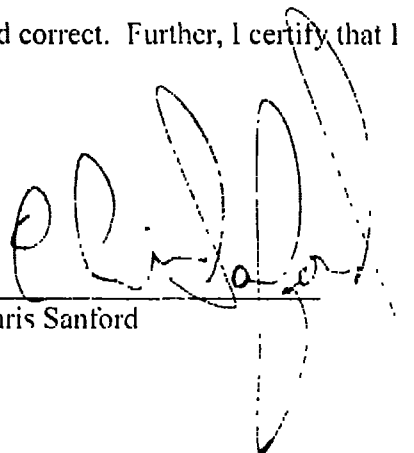
VERIFICATION

OF

CHRIS SANFORD

I, Chris Sanford, Senior Manager, Interline Marketing for Union Pacific Railroad Company, declare under penalty of perjury that I have read Union Pacific Railroad Company's Opening Statement and that the portions quantifying the amount of traffic interchanged between BNSF Railway Company and Union Pacific in 2010 is true and correct. Further, I certify that I am qualified and authorized to sponsor this testimony.

Executed on November 2, 2011.


Chris Sanford

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November 2011, I caused a copy of the foregoing document to be served by email and by first-class mail, postage prepaid, on:

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